No. 84-1503

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, *et al.*,
Petitioners,
v.
ANNIE LEE HUDSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE CHICAGO TEACHERS UNION, LOCAL NO. 1, ET AL., PETITIONERS, AND FOR THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL., RESPONDENTS SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The court below held that a public employee who is represented by an exclusive bargaining representative and who objects to providing financial support to that representative is deprived of liberty without due process where an employer, acting pursuant to state law, deducts from the individual's pay an amount equal to the proportion of union dues that the union has determined it expends on collective bargaining and contract administration and where the union places that money in escrow pending an arbitrator's or state court's review of the union's determination. The question presented by this decision is:

> Is the court of appeals' holding that the procedure at issue here is unconstitutional contrary to this Court's opinions interpreting the First and Fourteenth Amendments and, in particular, its opinions in the line of cases from *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956) to *Ellis v. Railway Clerks*, —— U.S. ——, 52 L.W. 4499 (1984) and its recent summary decisions in *Jibson v. White Cloud Education Association*, —— U.S. ——, 53 L.W. 3268 (1984) and *Kempner v. Local 2077*, —— U.S. ——, 53 L.W. 3323 (1984)? *

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* The parties to this case are the following: (1) The plaintiffs-appellees below: Annie Lee Hudson; K. Celeste Campbell; Estherlene Holmes; Edna Rose McCoy; Dr. Debra Ann Petitan; Walter A. Sherrill; and Beverly F. Underwood; (2) the defendants-appellants below: The Chicago Teachers Union, Local No. 1; Robert M. Healey; Jacqueline B. Vaughn; Rochelle D. Hart; Thomas H. Reece; Glendis Hambrick, individually and as officers of the Chicago Teachers Union; Board of Education of the City of Chicago, Illinois; Raoul Villalobos; Martha Jantho; Thomas Corcoran; Betty Bonow; Sol Brandzel; Clark Burrus; Leon Jackson; Rose Mary Janus; Dr. Wilfred Reid; Myrna Salazar; Dr. Luis Falces; Viola Thomas, individually and as officers and members of the Board of Education for the City of Chicago, Illinois.

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This brief is submitted jointly by the Chicago Teachers Union Local No. 1 *et al.*, petitioners, and the Board of Education of the City of Chicago and its officers and members, respondents supporting petitioners.[1] The petitioners and those respondents were co-defendants in the district court and co-appellees in the court of appeals. The petitioners and the respondents supporting petition-

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[1] Although the Board of Education and its officers and members participated actively in the lower courts, they did not because of the press of events file their own *certiorari* petition from the adverse decision of the court of appeals. Once this Court issued a writ of *certiorari*, the Board and its officers and members determined to participate actively as a party in this Court and in so doing to align themselves in support of the position of the petitioners, their fellow defendants-appellees in the courts below.

ers have a common legal position in this case, and they submit this joint brief to state that position only once.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported at 573 F.Supp. 1505 and is reprinted at pp. A-24 to A-57 of the Appendix to the Petition for a Writ of Certiorari (hereinafter "App."). The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 743 F.2d 1187 and is reprinted at App. A-1 to A-21.

JURISDICTION

The Seventh Circuit's judgment was entered on September 6, 1984. App. A-22. Timely petitions for rehearing *en banc* were denied on October 24, 1984. App. A-23. On January 14, 1985, Justice Stevens signed an order extending the time for filing a petition for a writ of *certiorari* to and including March 23, 1985. The *certiorari* petition was filed that day and was granted on June 10, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Illinois Revised Statutes, ch. 122, § 10-22.40(a) (1983) at all times relevant here provided:

> Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payments shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization.

STATEMENT OF THE CASE

Chicago Teachers Union, Local No. 1 ("CTU" or "the Union") is the exclusive bargaining representative for a unit of 27,500 employees comprised of teachers and other educational workers employed by the Board of Education of the City of Chicago ("the Board of Education" or "the Board"). App. A-1, A-26.

During the period 1967 through November, 1982, every employee in the bargaining unit received all the benefits of the CTU-Board of Education collective bargaining agreement and its administration by the Union, but not every such employee elected to join CTU and thereby to pay his/her financial share for CTU's activities on behalf of the employee group. App. A-25 to A-26. Effective August 1, 1981, the Illinois legislature enacted a statute providing that a collective bargaining agreement covering public school employees may contain "a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required by members"; under the statute these "proportionate share payments shall be deducted by the Board from the earnings of the non-member employees and paid to the representative organization." Ill. Rev. Stat. ch. 122, § 10-22.40a(1983). App. A-26 to A-27.[2]

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[2] Effective July 1, 1984, the Illinois statute quoted in text was superseded by the Illinois Education Labor Relations Act, Ill. Stat. Ann. ch. 48 ¶ 1701, *et seq.* (Smith-Hurd 1984 Supp.). That law authorizes the deduction from non-members' earnings of a "fair share fee for services rendered . . . not to exceed the dues uniformly required of members" and "not [to] include any fees for contributions related to the election or support of any candidate for political office." *Id.*, ¶ 1711. Under that provision, the "exclusive representative shall certify to the employer . . . each non-member's fair share fee" and that fee "shall be deducted by the employer from the earnings of the non-member employees and paid to the exclusive representative." *Id.*

CTU and the Board of Education thereafter agreed to a provision in their collective bargaining agreement that became effective September 1, 1982 paralleling the Illinois law and providing for the deduction of "proportionate share payments" from the earnings of bargaining unit employees who are not members of CTU. App. A-27.[3]

Following the negotiation of the contract, CTU made what the district court found to be "a thorough analysis of its financial records in good faith compliance with both the statute and its agreement with the Board." App. A-51. Subtracting expenditures for benefits conditioned upon membership and expenditures for political,[4] ideological, charitable and philanthropic causes not related to the collective bargaining process, the Union determined that 95.4% of its expenditures in the prior year had been for matters chargeable to non-members, *viz.*, for "the collective bargaining process and contract administration." To provide a margin for mathematical miscalculation or oversights, CTU decided to provide an advance reduction in union dues of 5% for non-members, yielding ten monthly proportionate share payments of $16.48 for non-member teachers, and $11.54 for non-members employed in the bargaining unit in other capacities. App. A-29. The district court found that the Union "carefully documented its calculation of the fair share fee." App. A-45. In December, 1982, the Board of Education commenced

[3] A "proportionate share payment" is referred to in other jurisdictions as a "fair share fee," a "service fee" or an "agency shop fee." We use the term "proportionate share payment" here because that is the term contained in the Illinois law.

[4] In 1981-82, CTU had established a separate CTU-PAC, funded only by voluntary contributions, from which all political contributions thereafter were made. R. 58; Tr. 63, 100-102. Thus, the only political expenditures from the Union's general fund were such incidental costs as clerical wages for preparing mailings, postage and phone bank expenses.

deducting proportionate share payments from non-members' earnings on the basis of CTU's calculation. App. A-45.

Before the first deductions were made, CTU established an appeals procedure to adjudicate any objections non-members might raise "concerning the existence and/or propriety of expenditures included in the proportionate share payments." App. A-28. That appeals procedure begins with an internal union review and culminates in a decision by an impartial arbitrator, accredited by a national arbitration organization and appointed by the CTU president from a list maintained by the Illinois State Board of Education for adjudicating tenured teacher dismissals. In addition, the Illinois courts, under their general "jurisdiction to adjudicate all controversies," *Lopin v. Cullerton*, 46 Ill. App. 3d 387, 361 N.E.2d 6 (1977), *see also Roth v. Yackley*, 77 Ill.2d 423, 396 N.E.2d 520 (1979), are open to any non-member who believes that he/she is being charged for expenses that are not part of the cost of "the collective bargaining process and contract administration," in violation of the statute.[5]

The seven employees of the Board of Education who are respondents in this case at all times relevant here worked in the bargaining unit represented by CTU but were not members of the Union. App. A-30. After the deduction of the proportionate share payments began, one of the respondents wrote to CTU objecting that the charge was more than a pro rata share of the Union's expenditures for collective bargaining and contract administration; a second respondent wrote to CTU objecting to the deduction of any amount from her sal-

[5] Whether the Illinois state courts, as a matter of state law, would have required invocation of union remedies before adjudicating an objector's claim is uncertain, as no objector sued in state court.

ary. App. A-30 to A-31.[6] The Union responded by letter explaining the legal basis for the proportionate share payment, the manner in which the sum had been calculated by CTU, and the internal appeals procedure CTU had established; the letters stated that "[a]ny objection you may file will be recognized and processed in full compliance with the prescribed procedures . . ." App. A-31.

None of the employee-respondents pursued CTU's internal procedure in response to the Union's letters, nor did any of them sue in state court under Illinois law to challenge the amount of the deduction. Instead, in March 1983, the employee-respondents commenced this action in federal court against the Board of Education and CTU alleging that the deduction by the Board of the proportionate share payments deprived them of freedom of expression and association and of due process of law. The district court dismissed these claims. R-71.

On appeal, the employee-respondents elected to "make almost their whole attack on the *procedure* for determining how much shall be deducted." App. A-3 (emphasis added). Thus, as the court below stated, the question that was posed by the employee-respondents on appeal was whether they

> have a federal right to challenge a procedure that may not have resulted in any improper expenditures —whether, in other words, even if the union has not used any of the money it has collected from objecting employees to promote political activities unrelated to its role in collective bargaining, the plaintiffs can still complain that they have been deprived of the liberty secured them by the Constitution. [App. A-4 to A-5.]

[6] Two other employee-respondents submitted "objections" to CTU before the amount of the proportionate share payment was set; the remaining three employee-respondents never notified CTU that they objected to the proportionate share payments. App. A-30. The district court concluded that these five respondents were not entitled to any relief as they had not protested the fee to CTU. App. A-33. The court of appeals did not disturb the district court's ruling in this regard, and these five respondents have not cross-petitioned to seek review of that ruling.

Before the case reached the court of appeals, CTU began voluntarily placing in escrow the proportionate share payments of non-members who had perfected an objection and CTU amended its procedure for collecting proportionate share payments to include an escrow provision. App. A-14. Under that escrow arrangement, if a non-member submits an objection to the amount of the advance reduction determined by the Union, the entire amount of the objector's reduced payments is held in an interest-bearing escrow account until a determination is made as to whether the payment represents a *pro rata* share of the cost of collective bargaining and contract administration.

Thus, the appellate court was presented with and decided a case in which the issue is the constitutionality of a procedure that provides that: (i) objectors are to pay what the district court found to be "a carefully precalculated portion of union dues" (a portion based on CTU's "good faith," "carefully documented" calculation of the percentage of its income expended on matters related to the collective bargaining process in the immediately preceding year), App. A-45, A-51; and (ii) the full amount of the objector's payment is placed in an escrow account *pendente lite*. The court below held that procedure to be constitutionally defective. That court concluded that a public employer may deduct proportionate share payments only if the employer "establish[es] a procedure that will make reasonably sure that the wages of non-union employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining." App. A-9; *see also* n. 9 *infra*. Specifically, the court below stated:

> Without wanting to be dogmatic or to foreclose consideration of alternative procedures, we suggest that the constitutional minimum would be fair notice, a

> prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision. [App. A-12 to A-13.]

And the court of appeals emphasized that the burden was on "the Board, pursuant to our decision, [to] create[] such procedures." App. A-9.

SUMMARY OF ARGUMENT

Although the question posed here is one of constitutional procedure—whether the system for effectuating the "proportionate share payment" requirement in the collective bargaining agreement between CTU and the Board of Education violates the constitutional rights of objecting employees—to answer that question it is necessary first to understand the substantive constitutional rights that are implicated. This Court's decisions make clear that employees do not have an absolute constitutional right of nonassociation that privileges a total refusal to provide any financial support to their exclusive bargaining representative, and that therefore the collection of a proportionate share fee does not in and of itself pose any constitutional issue. Objecting employees do, however, have a limited constitutional right pertaining to the *use* of their funds: those moneys may not be used to finance political or ideological activity unrelated to collective bargaining. It follows that in collecting proportionate share payments, a mechanism must be established to "prevent[] compulsory subsidization of ideological activity by employees who object thereto." *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977). But that mechanism must not "restrict[] the Union's ability to require every employee to contribute to the cost of collective bargaining activities," *id.*, and thereby unduly burden nonobjectors; the aim is to "protect both [majority and minority] interests to the maximum extent possible without

undue impingement of one on the other." *Machinists v. Street*, 367 U.S. 740, 771 (1961). Part A, pp. 10-15, *infra.*

The proportionate share procedure at issue in this case satisfies the requirements of the Constitution. Not only does CTU reduce the payments made by objectors based on the Union's careful, good faith determination of the proportion of its expenditures that goes for purposes that objectors may not lawfully be required to support, but, morever, 100% of the objector's precalculated and reduced proportionate share payment is placed in escrow, and thus is not available to the Union for its use, pending invocation of the Union's internal procedure and/or judicial review. There is therefore no possibility of even temporary "compulsory subsidization of ideological activity by employees who object thereto." In short, the combination of an advance reduction and a 100% escrow necessarily satisfies all constitutional requirements, as this Court's decision in *Ellis v. Railway Clerks*, —— U.S. ——, 52 L.W. 4499 (1984), unmistakably teaches. Part B, pp. 16-19, *infra.*

The court of appeals' criticism of the escrow system here is wide of the mark. The fact that CTU is not legally obligated to continue the escrow is irrelevant: the Union is committed to continuing that procedure and, in any event, CTU's procedure for effecting proportionate share payments must be judged as the procedure exists at present, and cannot be held unconstitutional because of the theoretical possibility that CTU will in the future adopt some *other* procedure that might not pass constitutional muster. Similarly, the financial terms under which proportionate share payments are held in escrow are of no constitutional significance; what is critical is that the money is in escrow and therefore is not available to the union for its use. The objector's "grievance stems from the spending of their funds" for unauthorized purposes and "not from the enforcement

of the union-shop agreement by the mere collection of funds." *Street*, 367 U.S. at 771. And the appellate court's concern over CTU's internal appeals procedure is likewise misplaced, because an objector's proportionate share payment is not reelased from escrow at the culmination of the internal proceeding but continues in escrow until the objector has, if he/she wishes, secured a final judicial determination—through procedures satisfying every conceivable Due Process requirement—that the amount of the payment comports with Illinois law and with the Constitution. Part C, pp. 20-24, *infra*.

None of this is meant to suggest that a 100% escrow procedure is constitutionally required. Such a procedure has an obvious drawback: by denying the union any money from objectors *pendente lite*, the 100% escrow cuts deeply against the governmental interests that justify the proportionate share payment system and against the constitutional interests of nonobjecting employees. There are alternative procedures, approved in general terms in *Ellis*, which deny the union use of only part of the objectors' payments pending judicial review of the amount of the payment. Such procedures can reduce to virtual insignificance the risk that objectors' funds will be used temporarily to subsidize activities to which objectors need not contribute. And whatever theoretical danger of temporary subsidization may remain under such procedures is far outweighed by the certainty that denying the union any part of the objectors' money would burden the nonobjectors by requiring them temporarily to shoulder the full cost of the union's collective bargaining activities. Part D, pp. 24-28, *infra*.

ARGUMENT

THE PROCEDURES FOR ASSESSING PROPORTIONATE SHARE PAYMENTS AT ISSUE HERE SATISFY THE REQUIREMENTS OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. *The Underlying Substantive First Amendment Rights.* As the court below observed, the question posed by this case is one of constitutional procedure: whether the system for effectuating the "proportionate share payment" requirement in the collective bargaining agreement between CTU and the Board of Education violates the constitutional rights of objecting employees. To answer that question it is necessary first to be clear as to the nature of the substantive constitutional rights that are implicated. We thus begin by reviewing this Court's teachings on that subject.

There is no doubt that employees do not have an absolute constitutional right of non-association that privileges a total refusal to provide any financial support to their exclusive bargaining representative. This much was established almost three decades ago in *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), in which the Court held that "the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work . . . does not violate either the First or Fifth Amendments." *Id.* at 238. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court reaffirmed, and elaborated on, that conclusion:

> To compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests. An employee may well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. . . . To be required to help finance the union as a collective bargaining agent might well be thought . . . to interfere in some way with an employee's freedom to associate for the

advancement of ideas, or to refrain from doing so, as he sees fit. *But the judgment clearly made in Hanson . . . is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.* "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." [431 U.S. at 222-23; emphasis added.]

Thus, as *Hanson* and *Abood* show, and as *Machinists v. Street*, 367 U.S. 740, 771 (1961), states in terms, "the union-shop agreement itself is not unlawful," and objectors have no constitutional grievance "from the enforcement of the union shop agreement by the mere collection of funds." [7]

At the same time, *Abood* establishes that objecting employees do have a limited constitutional right pertaining to the *use* of their funds. The objectors in *Abood* "specifically argue[d] that they may constitutionally prevent the Union's spending a part of their required service fees to

[7] The court of appeals thought that *Hanson* is "no longer authoritative" insofar as that case holds that "the use of agency fees for contract negotiation and administration" is not a "deprivation of liberty that is forbidden to the states and their agencies without due process of law." App. A-8. But as the quotation in the text from *Abood* shows, *Hanson* was reaffirmed on precisely this point in *Abood;* indeed, the *Abood* Court quoted the very passages in *Hanson* that the court below cited as "no longer authoritative," *compare Abood, supra,* 431 U.S. at 217-19 *with* App. A-8, and the *Abood* Court expressly refused the invitation of the objecting employees in that case to "revers[e] the *Hanson* case, *sub silentio.*" 431 U.S. at 223. In *Ellis v. Railway Clerks,* —— U.S. ——, 52 L.W. 4499, 4504 (1984), the Court again reaffirmed *Hanson,* citing the very passages the court below thought to be "no longer authoritative" as establishing that a union security agreement "is justified by the governmental interest in industrial peace."

contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." 431 U.S. at 234. The Court "concluded that this argument is a meritorious one," holding as follows:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective bargaining representative. Rather, the Constitution requires only that such expenditure be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment. [431 U.S. at 235-236.] [8]

Thus, "while it has long been settled that such interference with First Amendment rights [as may result from a union security agreement] is justified by the governmental interest in industrial peace," it is equally plain that the "First Amendment does limit the uses to which the union can put funds obtained from dissenting employees." *Ellis v. Railway Clerks,* —— U.S. ——, 52 L.W. 4499, 4504 (1984). The objector's only cognizable complaint, then, "stems from the spending of their funds for purposes not authorized by the [Constitution]; [i]f [objectors'] money were used for [permissible] purposes . . . [the objectors] would have no grievance at all." *Street,* 367 U.S. at 771.

It follows, as *Abood* makes clear, that while the Constitution permits collecting proportionate share payments from objectors, a mechanism must be established to "pre-

[8] In *Street,* the Court, to avoid constitutional difficulties, construed the Railway Labor Act "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." 367 U.S. at 768-69. In *Abood,* the Court held that the First Amendment itself precludes such a use of an objector's payments.

vent[] compulsory subsidization of ideological activity by employees who object thereto." 431 U.S. at 237. Indeed, "the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Ellis*, 52 L.W. at 4501. *See also Abood*, 431 U.S. at 244 (Stevens, J., concurring). But as *Abood* also establishes, whatever procedure is developed should not "restrict[] the Union's ability to require every employee to contribute to the cost of collective bargaining activities," 431 U.S. at 237, as to do so "might well interfere with the . . . unions' performance of [their] functions and duties," *Street*, 367 U.S. at 771-72. And that conclusion is buttressed by the need to safeguard the First Amendment rights of non-objecting employees, for "union members who do wish part of their dues to be used for political purposes have a right to associate to that end 'without being silenced by the dissenters.'" *Abood*, 431 U.S. at 238. The aim, in short, is "[t]o attain the appropriate reconciliation between majority and dissenting interests" by "select[ing] remedies which protect both interests to the maximum extent possible without undue impingement of one on the other." *Street*, 367 U.S. at 771.

Read together, the decisions from *Hanson* to *Ellis* teach three lessons that are relevant here. First, in light of "the governmental interest in industrial peace," an objector may constitutionally be required "to support financially an organization with whose principles and demands he may disagree," notwithstanding the objector's countervailing "First Amendment interests." *Ellis*, 52 L.W. at 4504. Second, an objector's money may not constitutionally be used, even temporarily, for "ideological activities unrelated to collective bargaining." *Abood*, 431 U.S. at 236. And third, the courts while "preventing compulsory subsidization of ideological activity by employees who object thereto" must not "restrict[] the Union's ability to require every employee to contribute to the cost of collective bargaining activities." *Abood*,

431 U.S. at 231. It is against this backdrop that the issue of constitutional procedure posed by this case must be addressed.[9]

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[9] The court below thought that objectors enjoy yet another constitutional right, albeit one not recognized in *Abood*, *see* App. A-8: the right to refuse to "support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological," App. at A-9 (emphasis in original). That court found this right in the "freedom of association" (or more precisely in the "'freedom not to associate'") as distinguished from the "freedom of expression" which latter freedom, according to the appellate court, is the basis for an objector's right not to be compelled to support "political and ideological activities." *See* App. A-5 to A-9. The court below reasoned that each additional penny an objector is required to contribute to a union somehow works an additional deprivation of an objector's freedom not to associate with the union and that therefore proportionate share payments may "go no further than is necessary to prevent the individual from taking a free ride on an entity that . . . is providing services to him as his collective bargaining representative." App. at A-7.

The lower court's opinion in this regard is squarely contrary to *Ellis*. In upholding the constitutionality of the Railway Labor Act insofar as the RLA requires objectors to contribute to the cost of union social activities open to all bargaining unit employees, the Court in *Ellis* reasoned that because a social activity does not involve "communicative content" or "the expression of ideas," the only conceivable basis for objecting to supporting this activity "stems from the union's involvement in it. The objection is that these are *union* social hours." 52 L.W. at 4504 (emphasis in original). The Court found that an insufficient basis for recognizing a constitutional privilege because, unlike the court below, this Court concluded that the additional monetary charge "does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union." *Id.* Thus, under *Ellis* only expenditures that "involve *additional* interference with the First Amendment interests of objecting employees" over that occasioned by supporting collective bargaining activity narrowly defined raise constitutional issues. *Id.* Because, as *Ellis* demonstrates, expenditures for union activity of a non-political, non-ideological nature do not involve such interference, objectors may be compelled to support such activity.

We do not pursue further the conflict between the decision below and *Ellis* on this point for two reasons. First, because even the

B. *The Validity of the Initial Reduction and 100% Escrow System At Issue Here.* After *Abood* and *Ellis* there is no doubt that while the collection of proportionate share payments from objectors does not, in and of itself, raise constitutional questions, the use of such payments by a union may.[10] It is therefore settled that there must be adequate safeguards to assure that the objectors' moneys are not improperly used, even temporarily. In this regard the Court has observed that there are several "readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest burden, if any, on the union." *Ellis*, 52 L.W. at 4501.

The requirement that one of these alternatives be used to effectuate a proportionate share payment agreement may be viewed, as the court below suggested, either as a mandate of the First Amendment (as made applicable to the States through the substantive component of the Due Process Clause), App. A-5, or, alternatively, as a mandate of the procedural component of the Due Process Clause, whose application is triggered by the existence of the ob-

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court below acknowledged that objectors may constitutionally be required to support activities "germane to collective bargaining," App. A-9, and because the Illinois law permits compelled contributions for the "cost of the collective-bargaining process and contract administration," it is entirely hypothetical whether there are any activities which an objector may be required to support under the statute as to which the court below would extend a constitutional privilege. Second, for purposes of the procedural issue presented in this case it is not necessary to determine whether union activities that are non-ideological and non-political but arguably not germane to collective bargaining are chargeable or non-chargeable to objectors; that determination is relevant only in fixing the *substantive standard* to be applied in assessing the amount of proportionate share payments.

[10] Because the Board of Education's only involvement in the proportionate-share payment system is to participate in the collection of those payments which, in and of itself, does not raise a constitutional issue, the claim against the Board is of the most attenuated kind.

jector's First Amendment right to be free from providing "compulsory subsidization of ideological activity," which right is part of the "liberty" that the Due Process Clause protects, App. A-6 to A-8.[11] But as we proceed to show, whatever the source of this requirement, the court below erred in concluding that the procedure at issue here is constitutionally insufficient and in ordering the Board of Education to create cumbersome, additional procedures.

The court below acknowledged, albeit grudgingly, that CTU "calculated the percentage of its expenditures that it believed (or at least claimed) had been costs of negotiating or administering the contract" and CTU set the pro-

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[11] Insofar as an individual has a First Amendment right to engage, or not engage, in certain conduct there is no doubt that the right is part of the "liberty" of which an individual cannot be deprived without Due Process; indeed, that is the premise on which the Bill of Rights has been held to be applicable to the States.

There is language in the opinion below that goes much further and suggests that an interest that is cognizable under the First Amendment but does *not* rise to the level of a constitutional right because outweighed by some countervailing governmental interest nonetheless constitutes part of the "liberty" protected by Due Process. Specifically, the court below stated:

> [*Abood*] made clear . . . that even the use of agency fees for contract negotiation and administration is an interference with First Amendment liberty (though a lawful interference), offering as an example the union's negotiating a clause requiring the employer to reimburse employees for the expense of abortions. *Such interference is a deprivation of liberty that is forbidden to the states and their agencies without due process of law.* [App. A-8; emphasis added; citations omitted. *See also* App. A-6.]

This suggestion is wrong; the lower court's reasoning would effectively extend the protection afforded to constitutional *rights* to every inchoate constitutional interest that does *not* rise to the level of a right. And the lower court would accomplish this protection of non-rights by the discredited technique of giving an extraordinary expansive reading to the term "liberty" as used in th Due Process Clause. Nothing in this Court's modern jurisprudence supports this approach.

portionate share payment at that percent of dues. App. A-9; *see also id.* A-14.[12] That court also acknowledged that CTU "voluntarily plac[es] dissenters' agency fees in escrow." App. A-14. Specifically, if a non-member in the CTU bargaining unit objects to the proportionate share deduction (in the "carefully precalculated" reduced amount determined by the Union "in good faith"), the payment is placed in an escrow account until the objector has invoked his/her chosen avenues of challenge, including litigation in the state court system, and has secured a final determination whether the union erred in calculating the advance reduction, *viz.*, whether the amount of the payment encompasses a share of union expenditures to which the objector may not statutorily or constitutionally be compelled to contribute. This combination of protective features for safeguarding objectors' rights—good faith advance reduction, 100% escrow, and the right to judicial review of CTU's determination of the amount of the proportionate share payment—eliminates any conceivable constitutional objection to CTU's system for effectuating the proportionate share payments.

Under this system, there is no possibility that the Union will be able "to commit dissenters' funds to improper uses even temporarily." *Ellis*, 52 L.W. at 4501. Not only does CTU make a careful, good faith advance determination of the portion of its expenditures that goes for purposes for which objectors may lawfully be charged but, moreover, the escrow arrangement means that the Union is unable to commit objectors' funds to *any* use whatsoever until after the objector has secured

[12] Contrast the appellate court's statement concerning CTU's advance reduction with the district court's findings—improperly ignored by the court of appeals, *see Anderson v. City of Besemer*, —— U.S. ——, 53 L.W. 4314, 4317 (1985)—that "CTU made a thorough analysis of its financial records in good faith compliance with both the statute and its agreement with the Board," App. A-51, and that "[t]he union carefully documented its calculation of the fair share fee." App. A-45.

state court review of the Union's determination. And on release from escrow, the Union receives only the amount of money equal to the percentage of its expenditures determined by the court to have been spent for collective bargaining and contract administration. Consequently there is no risk that objectors will be deprived of their First Amendment liberty without Due Process.

The short of the matter is this: given that the constitutional right at stake here is the objector's right not to have his payments *used* by a union for certain purposes, a system which prevents the money from being used by the union for *any* purpose until a final judicial determination is made as to the purposes for which the objector's fee may be used necessarily passes constitutional muster. Accordingly, the court below erred in holding the CTU 100% escrow procedure to be unconstitutional.

Ellis itself commands this conclusion. After noting the detriments to the objectors of the procedure at issue there, in which the union "exact[ed] and us[ed] full dues, then refund[ed] months later the portion that it was not allowed to exact in the first place," the Court stated:

> The only justification for this . . . would be administrative convenience. But there are readily available alternatives, *such as advance reduction of dues and/or interest-bearing escrow accounts*, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. [52 L.W. at 4501; emphasis added.] [13]

[13] In this regard, *Ellis* follows this Court's summary decision in *Threlkeld v. Robbinsdale Federation of Teachers*, 459 U.S. 802 (1982). That case came to this Court on appeal from a decision of the Minnesota Supreme Court rejecting a procedural due process challenge to Minnesota's proportionate share statute. That court had construed the state law to permit the state courts to "determine the validity and proper amount of the [proportionate] share fee"

C. *The Errors in the Court of Appeals' Rationale.* The court below faulted the CTU escrow procedure in three respects; as we proceed to show, that court's reasoning cannot withstand analysis.

1. The court of appeals first voiced concern that "[t]he union has made no commitment to continue to place [objectors'] fees in escrow." App. A-14. If by that observation that court meant to question the Union's intention to continue the escrow system, the observation is wholly unwarranted: CTU, as its counsel made plain to the court below, is committed to the escrow system the Union itself developed and has every intention of maintaining that system.[14] If, instead, the appellate court's point was that CTU is not legally obligated to continue the escrow system, the observation is true but irrelevant: the procedure for effectuating proportionate share payments must be judged as the procedure exists at present, and cannot be held unconstitutional (with the resulting shift to the Board of Education of expensive, time-consuming, supervisory obligations) because of the theoretical possibility

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and to "enjoin the use of the disputed fee until the exclusive representative establishes to the satisfaction of the district court the validity and correctness of the fee"; the Minnesota State Court held, however, that "in the absence of unusual circumstances, the hearing and final judicial determination of the fee's validity may follow the actual withholding of the [proportionate] share fee from the employee's paycheck." 307 Minn. 96, 239 N.W.2d 437 (1976), *vacated and remanded,* 429 U.S. 880, *reinstated on remand,* 316 N.W.2d 551, *appeal dismissed,* 459 U.S. 802. Thus, as construed, the Minnesota statute created a system less protective of objectors than the one at issue here, in which proportionate share fees in the full amount of union dues were collected from objectors but were not used *pendente lite.* This Court dismissed the objector's appeal challenging the constitutionality of the Minnesota law on the ground that the appeal did not present a substantial federal question.

[14] Indeed, CTU's counsel stated below that the Union would consent to a modification of the district court's judgment to mandate the escrow system.

that CTU will in the future adopt some *other* procedure that might not pass constitutional muster.

Ironically, the court of appeals made this very point elsewhere in its opinion. In rejecting the employee-respondents' request that the court below invalidate the Illinois statute because the statute "fails to set forth constitutionally adequate procedures—or indeed any procedures—for determining dissenters' objections," App. A-15, the court of appeals responded:

> We do not understand this argument. When the Board, pursuant to our decision, creates such procedures, the plaintiffs will not be able to complain just because these procedures are not written into a statute. [App. A-15]

2. The appellate court's principal objection to CTU's escrow procedure was that the terms of the escrow are "left entirely up to the union"; that court thought this significant because "[t]he union might decide, for example, to forego a high interest rate in order to punish dissenters (even though it would be punishing itself at the same time)." App. A-14 to A-15. But this objection simply does not implicate any First Amendment interest. As we have stressed, this Court has made clear that the constitutional issues raised by proportionate share payment provisions arise not from the collection of those payments but from the use of the objector's money for certain proscribed purposes; if the payments were used only for permissible purposes, the objector "would have no grievance at all." PP. 10-14 *supra.* Because that is so, the financial terms under which a proportionate share payment is held in escrow are of no constitutional significance; what is critical is that the money is in escrow and therefore is not available to the union for its use.[15] In-

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[15] The lower court implied that to the extent an objector is temporarily deprived of the use of his money, a First Amendment issue may be created because the escrowed money is "not available to

deed, even if an objector's escrow account did not generate any interest at all, escrowing 100% of the objector's proportionate share payment still would suffice to protect fully the First Amendment right of objectors as identified in *Abood* and *Ellis*: the right not to have their funds used, even temporarily, for "improper" purposes.

3. Although the court of appeals did not fault any other aspect of the CTU escrow arrangement as such, that court deemed inadequate the internal appeals procedure CTU established for reviewing objectors' challenges to the calculation of the proportionate share payment. *See* App. A-9 to A-12. Proceeding on the apparent premise that, under the CTU procedure, the decision reached through the internal union appeals process is determinative of the amount of the proportionate share payment that is released from escrow and made available to the Union for its use, the court below evaluated that process standing alone to determine if, in that court's judgment, the procedure provides adequate safeguards against temporary subsidization of union activities which objectors may not be required to support. The court below found the procedure wanting and "suggest[ed] that the constitutional minimum would be fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision." App. A-12 to A-13.

The court of appeals' apparent premise is wrong as a matter of fact: under the CTU escrow arrangement, an

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[the objector] to support other political activities." App. A-6. By this reasoning, every property deprivation would constitute a First Amendment violation as well. All of the Court's cases involving property deprivations, from *Goldberg v. Kelly*, 397 U.S. 254 (1970), on, make clear that this is not the law.

objector's proportionate share payment is *not* released from escrow at the culmination of the internal proceeding but is held in escrow until the objector has, if he/she wishes, secured a final *judicial* determination as to whether the amount of the payment comports with Illinois law and the Constitution. P. 5, *supra*. Thus, the question the appellate court seemingly addressed—the constitutionality of a system in which a union obtains the use of an objector's money based on a (union-retained) arbitrator's determination that the objector is being charged only for matters to which the objector may be required to contribute—is simply not presented in this case. Under the CTU system, the objector has the option of a judicial determination and the Union does not receive the use of the objector's money until such a determination has been rendered.

There can be no doubt that *this* escrow procedure satisfies every conceivable requirement of due process and that, at least in this context, there is no merit in the court of appeal's "suggestion" that the Constitution requires an "administrative hearing" followed by judicial review. It is, after all, the very essence of the judicial function—for state judges no less than for state administrative agencies—to provide fair and impartial hearings that comport with the requirements of due process. An administrative process would add nothing to the judicial procedure that is available to objecting fee payers as a matter of state law, and would be expensive and time consuming for the Board of Education to operate.

Indeed, in at least one respect, the administrative process the court of appeals contemplated would be inimical to the very point of the proportionate share payment requirement, *viz.*, to further the State's overriding interest in labor peace. *See* p. 11, *supra*. Under that court's "suggested" procedure, the Board of Education would be placed in the position of judge *vis-à-vis* the CTU, and

would be required to decide which of the Union's expenditures are properly chargeable to fee payers as part of the Union's cost of "collective bargaining" and "contract administration" and which are not. Placing the Board in that position would be bad for the Board, for the Union and for the collective bargaining system created to promote labor peace.

"The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.'" *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 394 (1982). From their separate conception of self-interest, each party determines its own needs and desires and then, through a process of persuasion, compromise and economic force, the parties arrive at an agreement which each concludes is acceptable. That entire process would be undermined if the independence and autonomy of either party in dealing with the other were not secure. And that is precisely what would happen if either party were placed in the role of overseer of the other.

Thus, the procedure the court below "suggested" is neither constitutionally necessary to protect the rights of objectors, nor practically desirable given the aims of the Illinois law.

D. *The Validity of Systems That Provide For Less Than 100% Escrow.* What we have just shown is, of course, sufficient to dispose of this case. But because of the breadth of the lower court's opinion—and in order to avoid any possible misunderstanding—we think it useful to venture a few more words to set forth our view that the escrow arrangement adopted by CTU, while constitutionally sufficient, is *not* constitutionally required to satisfy the requirements of the First and Fourteenth Amendments.

The starting point for our analysis is this Court's teaching that, "[d]ue process, unlike some legal rules, is not a

technical concept with a fixed content unrelated to time, place and circumstances. '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976). It would be the antithesis of this teaching to conclude that the *only* system that satisfies the requirements of due process is the one adopted by CTU.

In particular, the CTU 100% escrow system has an obvious drawback: the system cuts deeply against the governmental interests that justify requiring proportionate share payments and against the constitutional interests of non-objecting employees. Until all litigation is resolved, that system deprives the Union of any contributions from objectors, and thus places the entire burden of supporting the Union's collective bargaining activities on the nonobjectors. Depending on the number of objectors and the amounts involved, this "might well interfere with the . . . unions' performance of those functions and duties which the [law] places upon them." *Street*, 367 U.S. at 771. And by imposing extra burdens on nonobjectors to support collective bargaining activity, the 100% escrow system means that "union members who do wish part of their dues to be used for political purposes" are deprived of their "right to associate to that end," *Abood*, 431 U.S. at 238. Indeed, it is for precisely these reasons that this Court has held that "an injunction relieving dissenting employees of all obligation to pay . . . [is] impermissible." *Railway Clerks v. Allen*, 373 U.S. 103, 110 (1963); *see Street*, 367 U.S. at 771.

A number of unions have, therefore, adopted some variant of an alternative system in which, as in the CTU system, an initial determination is made by the union of the proportion of its income that in past years has been expended on activities for which objectors cannot be charged. The objector is then required to pay a reduced amount of dues no part of which is placed in escrow or, alternatively, the objector pays the full amount of dues and

the union's calculation is used to determine the amount of the payment that is to be placed in escrow (often with an extra amount to provide a margin for error).[16] In *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, —— U.S. ——, 53 L.W. 3599 (1985), the Third Circuit recently upheld several such systems.[17]

Ellis indicates, albeit in general terms, that approaches of this type are constitutionally acceptable. *See* p. 16, *supra* ("readily available alternatives, such as advance reduction of dues and/or interest bearing escrow accounts . . . place only the slightest additional burden, if any, on the union"). Moreover, subsequent to *Ellis*, this Court has on two occasions dismissed for want of a substantial federal question appeals challenging advance reduction procedures of the type just described. *Jibson v. White Cloud Education Association*, —— U.S. ——, 53 L.W. 3268 (1984), *dismissing appeal from* 101 Mich. App. 309, 300 N.W.2d 551; *Kempner v. Dearborn Local 2077*, —— U.S. ——, 53 L.W. 3323 (1984), *dismissing appeal from* 126 Mich. App. 452, 337 N.W.2d 354.[18]

These decisions recognize that advance reduction procedures satisfy the "objective" stated in *Abood*: "devis[ing] a way of preventing compulsory subsidization

[16] The reason that some unions, after calculating the proportion of the prior year's expenditures on nonchargeable activities, do not reduce an objector's dues by that proportion but rather place that portion of an objector's payments into escrow is because of a concern that if, during the year for which a payment is being made the union increases the portion of its expenditures on chargeable activities, the union's right to collect any additional money from the objector will be impaired.

[17] *See also San Jose Teachers Association v. Superior Court*, 38 Cal. 3d 839, 700 P.2d 1252 (1985); *Board of Education v. Kramer*, —— A.2d ——, 119 LRRM 3354 (N.J. Sup. Ct., June 25, 1985).

[18] Summary decisions by this Court are, of course, adjudications on the merits binding on the lower court. *E.g., Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975).

of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 431 U.S. at 237. The procedures just noted protect the objector's constitutional right not to subsidize ideological activity by either relieving the objector of the obligation to pay that portion of union dues that, based on experience, can be expected to go for "ideological activity" or by placing that portion of an objector's dues in escrow until a final determination is made as to how that union has in fact expended its income. But these procedures do not deprive the Union of the funds needed to support activity germane to collective bargaining *pendente lite*.

To be sure, there is some risk in any advance reduction system that the union may err in its calculation of the percentage of its income that in the prior year was devoted to nonchargeable activity or that because of contingencies that percentage may increase. That risk can be minimized—indeed can be reduced to virtual insignificance—if the union adds to the advance reduction or to the escrowed amount a comfortable margin for error.[19] And at least once that is done, the risk, or more precisely the theoretical possibility, that absent a 100% escrow some of the objectors' money could temporarily be used

[19] The risk of miscalculation can also be minimized if a union retains a neutral (such as an independent auditor or impartial labor arbitrator) to make the calculations. Because any decision that a neutral makes will be subject to *de novo* review by the courts which ultimately must decide whether the objector is being required to finance activities which he is privileged not to support, the appellate court's concern over the independence of a union-retained neutral is misplaced: the Due Process clause does not require that the *initial* decision-maker be wholly independent so long as the final decision-maker is. *Cf. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 16 (1978) (requiring initial hearing before "designated employee" of utility company before termination of utility service); *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (hearing before "the disciplinarian" prior to temporary suspension of student).

for impermissible purposes would be far outweighed by the *certainty* that denying the union any part of the objectors' money would burden the nonobjectors by requiring them, temporarily, to shoulder the full cost of the union's collective bargaining activities—activities which, as even the court below acknowledged, account for "most of the expenditures that a union makes," App. A-5. Thus, the 100% escrow does not achieve an "appropriate reconciliation between majority and dissenting interests"; in the name of protecting objectors, it allows "undue impingement" on the interests of the majority. *Street*, 367 U.S. at 771.

This Court's precedents recognize as much. In *Railway Clerks v. Allen*, *supra*, the Court stated that "[a]bsolute precision in the calculation of [the] proportion [of chargeable to nonchargeable expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." 373 U.S. at 122. And this ruling in turn reflects the general principle that

> [t]he Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determination. . . . [W]hen prompt, post-deprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonable reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be. [*Mackey v. Montrym*, 443 U.S. 1, 13 (1979).]

Thus if the issue were presented here—and because of the CTU 100% escrow system it is not—the Court should reaffirm the teaching of *Ellis* and its progeny that advance reduction systems without a 100% escrow also satisfy the requirements of the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded to that court with instructions to affirm the district court's judgment dismissing the complaint.

Respectfully submitted,

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